

Supreme Court, U. S.
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1975

—
No. 75-1489
—

BALZAC BROTHERS, INC.,
APPELLANTS,

v.

WARING PRODUCTS DIVISION DYNAMICS
OF AMERICA, et als.,
APPELLEES.

—
**ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(Three-Judge-Court)**

—
MOTION TO AFFIRM
—

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MOTION TO AFFIRM

Now comes Appellee, Waring Products Division Dynamics of America and by its undersigned counsel respectfully moves this Honorable Court to affirm the Opinion and Order of the Three-Judge-Court of the United States District Court of Puerto Rico on the grounds that the issues raised are so insubstantial that a plenary hearing is not warranted.

Jurisdictional Statement

Even though the jurisdiction of that Honorable Court was properly invoked by Appellant under the provisions of Title 28 United States Code, Section 1253, the issues presented by said appellants are so insubstantial that the Opinion and Order issued by the Three-Judge-Court of the United States District Court should be affirmed.

Introductory Statement of the Case

A Petition for Declaratory Judgment and Injunction was brought by Appellant, Balzac Brothers, Inc., hereinafter referred to as "Balzac", in the United States District Court for the District of Puerto Rico on the first day of November, 1973. Said complaint was amended on the seventh day of November, 1973.

Said action was brought under the provisions of Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1343, 2201 and 2281. A class action was brought under Rule 23A of the Federal Rules of Civil Procedure.

Appellant, requested from the Court a Judgment striking the unconstitutionality of Rule 56 of the Civil Procedure Rules of Puerto Rico alleging that said Rule 56 authorizes an attachment order ex-parte before a final judgment is issued by a judge and without a prior written notice.

Appellant also requested the granting of an Injunction against Marshall Nicolas Torres Renta, ordering him *not* to carry out an attachment order signed by Honorable Judge Flavio E. Cumpiano obtained by Appellee, Waring Products Division Dynamics Company of America, hereinafter referred to as "Waring", restraining the enforcement of the provisions of said Rule 56 based on the unconstitutionality of said rule. Appellant requested that the said injunction relief be directed against Appellee, "Waring" and against all the Marshalls of the System

of Courts of the Commonwealth of Puerto Rico barring them from issuing such attachment order under the same circumstances.

Appellant alleged that said rule is in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and deprived said Appellant of its property without due process of law.

The Honorable Judge Toledo of the District Court for the District of Puerto Rico entered a judgment on August 26, 1974 dismissing the action filed by "Balzac" on its merits without the convening of a Three-Judge-Court.

Said judgment was vacated, without expressing any judgment on its merits by the Court of Appeals on April 15, 1975.

The Court of Appeals held that in view of the decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) it could not be decided by a single court judge and remanded the case for the constituting of a three judge court which was convened pursuant to said mandate and Title 28 United States Code, Sections 2281 and 2284.

The Three-Judge-Court was constituted and entered Opinion and Order on February 10, 1976 subscribed by Honorable Judges, Edward M. McEntee, Circuit Judge, Jose V. Toledo, and Juan R. Torruella, District Judges, dismissing action against "Waring" and the other Appellees.

"Balzac" is requesting the Honorable Supreme Court to reverse the said Opinion and Order.

Statement of Facts

Waring Products Dynamics Company of America, hereinafter referred to as "Waring", filed suit against Balzac Brothers, Inc., herein referred to as "Balzac", in the San

Juan Superior Court on the seventh day of September of 1973, under case number 73-6743 in the Superior Court of Puerto Rico, San Juan Section, Waring Products Division of Dynamics Company of America, plaintiff v. Balzac Brothers, Inc., defendant, to collect from said "Balzac" the sum of nine thousand five hundred and eighty-five dollars (\$9,585.00) owed to Waring for merchandise sold on credit to Balzac and for which "Balzac" refused to pay after being required to make said payment. In addition to the above mentioned amount, "Waring" asked for interest owed, court costs and the amount of one thousand five-hundred dollars (\$1,500.00) for lawyers' fees.

On October 1, 1973, "Balzac" was served with legal notice of the claim filed against him and received a copy of the complaint. "Balzac" did nothing about requesting a hearing (Rule 56 of the Rules of Civil Procedure of Puerto Rico does not forbid in any way a request for a hearing from defendant). On October 6, 1973, "Balzac" requested an extension to answer the complaint and served "Waring" with Interrogatories. On October 31, 1973 after "Balzac" was properly served with a copy of the complaint and the Summons, "Waring", after placing a bond on the amount approved and ordered by Judge Espinosa of the Superior Court of San Juan, obtained an Order to attach property of "Balzac". Said Order was issued by the Honorable Judge of the Superior Court, Flavio E. Cumpiano on November 1, 1973 in compliance with Judge Espinosa's Order of October 4, 1973.

On November 1, 1973, Marshall Torres Renta presented the attachment order to "Balzac" in their business premises and he requested Marshall Torres Renta not to attach his property that he could raise the money in a bank through a loan and be able to make a cash deposit for the amount mentioned in the order. Marshall Torres

agreed to give him the opportunity requested and accompanied "Balzac" to the "Banco de San Juan", where a "loan" was made by "Balzac" for the amount of twelve thousand eighty-five dollars and four cents (\$12,085.04). Said check was delivered to the Marshall by an officer of the bank. The Marshall deposited said check in his account in lieu of the attachment Order designating property of "Balzac".

"Balzac" filed present action in the United States District Court for the District of Puerto Rico on the first day of November, 1973.

Appellee's Argument in Favor of Unsubstantiality of Question

The constitutionality of Rule 56 of the Puerto Rico Rules of Civil Procedure should be recognized by that Honorable Supreme Court as it satisfies the constitutional requirements of due process. Appellee "Waring" respectfully prays that the Opinion and Order of the Three-Judge-Court of the United States District Court for the District of Puerto Rico be affirmed as said Rule 56 does not violate the Due Process requirements of the Fifth and Fourteenth Amendments of the Constitution of the United States for the following reasons:

The Supreme Court of the Commonwealth of Puerto Rico has reiterated itself several times that said Rule 56 of the Rules of Civil Procedure of Puerto Rico is constitutional and has ruled that said Rule 56 does satisfy the due process requirements of the Constitution of the United States and that said rule "strikes a reasonable balance between the rights of plaintiffs and defendants in a context of strict judicial control. A higher degree of protection to a defendants' right than that provided by such control of the attachment procedures that may be invoked against defendant can not be conceived". See opinion of the

Supreme Court of Puerto Rico in *Ricardo Dominguez Talavera v. Tribunal Superior de Puerto Rico, Sala de San Juan, Honorable Osvaldo de la Luz Velez, Juez*, 0-73-344, September 12, 1974.

In *Freeman v. Superior Court*, 92 D.P.R. 1, 25 and *Piza Blondet v. Superior Court*, 0-74-480, February 25, 1976 the Supreme Court of Puerto Rico ruled that the judges role is not a pro-forma attachment proceeding under said Rule 56 and that the courts' discretion to grant or refuse is fixed by certain guides such as:

- 1) they must be temporary,
- 2) they must be intended to secure the effectiveness of a judgment that may be entered in due time, and
- 3) the interest of all parties must be considered as substantial justice and the circumstances of the case may require.

Before the Order of Attachment was issued, Honorable Judge Espinosa and Honorable Judge Cumpiano had the opportunity to consider the interests of both parties before requesting "Waring" the posting of a bond and the issuance of the Order of Attachment by Honorable Judge Cumpiano. These facts were Stipulated by "Balzac" and "Waring".

The question presented by "Balzac" whether said Rule 56 of the Rules of Civil Procedure of Puerto Rico violates the due process requirements of the Fifth and Fourteenth Amendments of the Constitution of the United States in authorizing in civil actions, where no final judgment has been rendered the attachment of a defendant's property, ex-parte, without prior notice and hearing and without providing for an adequate and immediate post-attachment hearing lacks merit as unsubstantial and unfounded.

Rule 56 was definitely designed, and it has been con-

sistently stated by the Supreme Court of Puerto Rico, to achieve a balance between the rights of a creditor and debtor.

The decisions of this Honorable Court in *North Georgia Finishing Co. v. Di-Chem*, 419 U.S. 601; 42 L.Ed. 751 S.Ct. 719 (1975); *Sniadach v. Family Finance Co. of Bay View*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969); and *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972); *Mitchell v. Grant*, 416 U.S. 600 (1974) are not inconsistent with the opinion of the Supreme Court of Puerto Rico in *Ricardo Dominguez Talavera v. Tribunal Superior, supra*.

This Honorable Court did not rule that *all* seizures of property without prior notice are unconstitutional and expresses the extraordinary circumstances where a seizure of property is justified as stated in *Fuentes v. Shevin, supra*, that in the case of a seizure with a postponement of notice and opportunity for a hearing an important governmental or general public interest must be involved.

The circumstances in the *Fuentes* decision, were clearly distinguished from those in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). *Mitchell* overruled *Fuentes*. *North Georgia* did not overrule *Mitchell*. This Honorable Court distinguishes very clearly the circumstances in each case. No judicial officer participated in the issuance of the garnishment and attachment orders.

Conclusion

Rule 56 does provide very clearly, a very strict judicial control over their issuance having in mind the conflicting interests of the parties, protecting the debtors' interests as well as the creditors, pending trial on the merits. Due process is not violated in Rule 56 as said due process is directed to the protection of the substantial rights. Rule

56 does not deny the defendant the right to request a hearing.

"Balzac" alleges that action brought against "Balzac" is still pending trial in the local court and that the debtor has a right to a prompt hearing in order to reduce to a minimum his deprivation of property and the time that the same be in *custodia legis* or in the creditor's possession. The dilatory tactics used by "Balzac" ever since "Waring" initiated legal proceedings in a local court have been numerous and have in every possible way tried to paralyze and delay proceedings. "Waring" has always been very prompt and have shown in every way genuine interest and good faith in finding a rapid solution to case filed under number 73-6743 filed by "Waring" against "Balzac" in the Superior Court of San Juan mentioned above for collection of money.

WHEREFORE, for the above expressed reasons, "Waring" respectfully requests this Honorable Court, dismiss appeal and Opinion and Order entered by the Three-Judge-Court of the United States District Court for the District of Puerto Rico be affirmed as question is unsubstantial.

At San Juan, Puerto Rico, July 16, 1976.

Respectfully submitted,

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